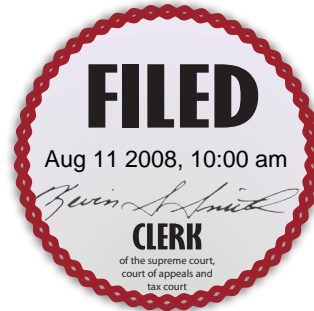


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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IN THE MATTERS OF VERNON PAYNE AND, )  
ELVA PAYNE IRREVOCABLE TRUST FOR )  
BEVERLY DRAPER AND AMENDMENT AND )  
RESTATEMENT OF VERNON PAYNE INTER )  
VIVOS TRUST, )

GAYLE PARKEVICH, )

Appellant, )

vs. )

JANET BEST, PAULA ELLER and )  
BEVERLY DRAPER, )

Appellees. )

No. 08A02-0709-CV-803

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APPEAL FROM THE CARROLL CIRCUIT COURT

The Honorable Donald E. Currie, Judge

Cause No. 08C01-0302-TR-1

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August 11, 2008

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**NAJAM, Judge**

## **STATEMENT OF THE CASE**

Gayle Parkevich appeals from an order of the Carroll Circuit Court denying her Petition to Re-Docket Trusts, Reform Mediated Settlement Agreement and Orders, and Appoint Special Trustee and Special Administrator of Trusts (“Petition to Re-Docket”). On appeal, we address a single dispositive issue, namely, whether the trial court abused its discretion when it denied the Petition to Re-Docket.

We dismiss the appeal.

## **FACTS AND PROCEDURAL HISTORY**

The relevant facts are set out, in part, in our opinion in a related matter, as follows:

Janet Best and Beverly Draper [“Draper”] are daughters of Vernon and Elva Payne. Parkevich and Paula Eller [“Eller”] are daughters of Beverly Draper. On June 2, 1989, Vernon and Elva Payne created the Vernon Payne and Elva Payne Irrevocable Trust for Beverly Draper (“Irrevocable Trust”). Also on June 2, 1989, Vernon created the Vernon Payne Inter Vivos Trust, which was twice amended and restated (“Vernon’s Trust”).

[Maribelle] Harlow is an attorney and practiced law with her husband, Stephen A. Harlow (“Stephen”), at the law firm of Harlow & Harlow. [Maribelle] provided certain legal services for Vernon and Elva. [Maribelle] left Harlow & Harlow in January 1990 to join the tax department of Ernst & Young as a certified public accountant and then advised Vernon and Elva regarding certain tax, accounting, and allegedly legal matters. Stephen continued to provide legal advice to Vernon and Elva.

Elva died on February 10, 1995, and Vernon died on December 29, 1996. Their daughter, Janet Best, became the trustee of the Irrevocable Trust and Vernon’s Trust upon Vernon’s death. Parkevich, Eller, and Draper are beneficiaries of the Irrevocable Trust. Parkevich is named as successor trustee and a beneficiary of Vernon’s Trust along with Draper and Eller.

Harlow v. Parkevich, 868 N.E.2d 822, 823-24 (Ind. Ct. App. 2007).

On October 22, 2002, Parkevich filed in the Hamilton Superior Court a petition to docket trusts and a motion for accounting with respect to the Irrevocable Trust and Vernon's Trust (collectively "the Trusts"). On January 17, 2003, the Hamilton Superior Court transferred the case to the Carroll Circuit Court. On November 22, 2004, Parkevich filed her motion for leave to file a first amended petition to docket trusts ("First Amended Petition"). In the First Amended Petition, Parkevich asserted additional claims, alleging breach of fiduciary duties, unjust enrichment, and conversion, and she sought the removal of Janet Best as trustee.<sup>1</sup>

On March 8 and May 3-12, 2005, Parkevich, Eller, Gary Eller, Draper, and Best (individually and as trustee of the Trusts) executed a Mediated Settlement Agreement that settled all claims in the First Amended Petition. Under the Mediated Settlement Agreement, the signatories acknowledged that the Irrevocable Trust had previously been fully distributed and terminated, and they agreed to

forever release and discharge each other . . . from any and all manner of actions, causes of action, suits, accounts, contracts, debts, claims, and demands whatsoever, at law or in equity, and however arising, on or before the date of this release . . . that . . . involve the . . . trusts of Vernon or Elva Payne.

Appellant's App. at 67. The Mediated Settlement Agreement also provided: "Notwithstanding any other provision herein, [Parkevich] retains any and all rights and standing to file an action or assert a claim, if any, against Steve or Mary Harlow. . . ." Id.

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<sup>1</sup> According to the Carroll County Chronological Case Summary ("CCS"), the trial court entered its order on the motion for leave to file first amended petition to docket trusts on December 16, 2004. However, a copy of the order is not in the Appendix.

at 71. As a result of the Mediated Settlement Agreement, the parties filed a joint stipulation of dismissal, which the trial court approved in May 2005.<sup>2</sup>

Less than one month after the dismissal of the First Amended Petition to Docket, the remaining beneficiaries of Vernon's Trust (Best, Eller, and Draper) entered into a confidential settlement agreement ("Confidential Agreement"). On June 17, 2005, in Carroll County, Best filed a Petition to Approve Confidential Settlement Agreement and Terminate [Vernon's] Trust Pursuant to Indiana Code Section 30-4-3-24. On the same date, the court approved that petition.

Meanwhile, on May 24, 2005, Parkevich filed in the Hamilton Superior Court a malpractice complaint ("Malpractice Complaint") against Stephen, Maribelle, and Maribelle's employer, Ernst & Young, LLP (collectively "Malpractice Defendants") under Indiana Code Sections 30-4-3-15 and -21. The Malpractice Complaint alleged that the Malpractice Defendants had been negligent in rendering professional services to Best as trustee of the Trusts. Maribelle and Ernst & Young filed a renewed motion for stay pending alternative dispute resolution, which the trial court denied after a hearing. Maribelle and Ernst & Young appealed.

While the appeal from the order denying stay was pending, Maribelle and Ernst & Young filed a motion for summary judgment, arguing that Parkevich lacked standing and was not a real party in interest to pursue the malpractice claims. Stephen joined in that motion. On June 20, 2007, the Hamilton Superior Court granted summary judgment in favor of the Malpractice Defendants, finding that Parkevich's claims in the Malpractice

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<sup>2</sup> The photocopy of the CCS in Appellant's Appendix is not clear enough to discern the filing date of the joint stipulation of the dismissal or the dates of the court's order approving the same.

Complaint were not justiciable because Parkevich lacked standing and was not a real party in interest.

The following day, June 21, 2007, this court issued its decision in the appeal regarding arbitrability (“First Appeal”), holding that the 2002 claim in the Malpractice Complaint was subject to arbitration. Parkevich, 868 N.E.2d at 829. Parkevich then filed in the Hamilton Superior Court a motion to correct error with respect to the June 20 entry of summary judgment. In response, the Hamilton Superior Court vacated the June 20 entry of summary judgment and ordered arbitration of one of three claims in the Malpractice Complaint in compliance with this court’s opinion in the First Appeal. The trial court also granted Parkevich’s motion to correct error in part to permit the court to reconsider the summary judgment motion regarding justiciability. Upon reconsideration the court granted summary judgment in favor of the Malpractice Defendants on the remaining two claims in the Malpractice Complaint, finding, again, that Parkevich lacked standing and was not a real party in interest.

On July 23, 2007, after the Hamilton Superior Court entered its order on Parkevich’s motion to correct error, Parkevich filed in the Carroll Circuit Court a petition to re-docket the Trusts and to reform the Mediated Settlement Agreement and the order approving that agreement. That petition alleges that Best, Draper, and Eller, without notice to Parkevich, petitioned the trial court to approve a confidential settlement agreement (“Confidential Settlement Agreement”) that provided for the full distribution of assets and the termination of Vernon’s Trust. The Petition to Re-Docket further alleges that Parkevich first learned of the Confidential Settlement Agreement and the

termination of Vernon's Trust in March 2007, and that, as a result of the termination of Vernon's Trust, the Hamilton Superior Court has found that Parkevich lacked standing and is not a real party in interest to pursue the professional negligence claims against the Malpractice Defendants.

On August 14, 2007, the trial court denied Parkevich's Petition to Re-Docket ("Re-Docket Order"). The Re-Docket Order provides, in relevant part:

[T]he Court being duly advised in the premises finds that the basis for redocketing the trust and further relief is based upon [Parkevich's] failure to receive notice of termination of notice [sic] filed June 17, 2005[.]

The Court further finds that [Parkevich] failed to timely request re-docketing of the trust, despite having learned of the trusts' [sic] termination in March[] 2007, and the petition should be DENIED.

Appellant's App. at 14. Parkevich now appeals.<sup>3</sup>

### **DISCUSSION AND DECISION**

Parkevich asserts that the trial court erred when it denied her Petition to Re-Docket based on laches. In that petition, she asked the trial court to re-docket the Trusts and to reform the order approving the Mediated Settlement Agreement to provide for the administration and distribution of the last remaining asset of Vernon's Trust: the malpractice action. That is, she requested clarification of her rights and standing to pursue the malpractice claims. Thus, the petition is dependent upon Parkevich's contention that, under the Mediated Settlement Agreement, she retained the rights and standing to pursue the malpractice claims against the Malpractice Defendants.

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<sup>3</sup> Parkevich also separately appeals the Hamilton Superior Court's Second Summary Judgment. She filed a motion to consolidate that appeal with the appeal in this case. On December 21, 2007, this court denied the motion to consolidate appeals. However, we decide that case today and hand it down simultaneously with the instant opinion. See In re Vernon Payne and Elva Payne Irrevocable Trust (Parkevich v. Harlow), No. 29A04-0711-CV-624 (Ind. Ct. App. August 11, 2008).

But we do not reach the merits of whether the trial court erred in denying the Petition to Re-Docket based on laches. Instead, we consider sua sponte whether that issue is justiciable. See Sowers v. LaPorte Superior Court, No. II, 577 N.E.2d 250, 251 n.1 (Ind. Ct. App. 1991) (considering sua sponte the justiciability of appellant's claim on appeal before addressing its merits). In a companion case, also handed down today, we hold that Parkevich does not have standing and is not a real party in interest to maintain the malpractice action. In re Vernon Payne and Evla Payne Irrevocable Trust (Parkevich v. Harlow), No. 29A04-0711-CV-624 (Ind. Ct. App. August 11, 2008). Because Parkevich does not have standing and is not a real party in interest to pursue the malpractice claims against the Malpractice Defendants, the trial court could grant no relief on her Petition to Re-Docket. As such, her appeal from the order denying the Petition to Re-Docket is moot. Gibson v. Hernandez, 764 N.E.2d 253, 255 (Ind. Ct. App. 2002) ("a case is deemed moot when no effective relief can be rendered to the parties before the court"), trans. denied. Therefore, we dismiss Parkevich's appeal from the trial court's denial of her Petition to Re-Docket.

Dismissed.

BAILEY, J., and CRONE, J., concur.